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No. 06-1653

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In The

Supreme Court of the United States

ERIC CLEMMONS,

Petitioner,

v.

ESTATE OF GEORGE BROOKS,
and
ALONZO GROSS and WILLIAM ARMONTROUT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S RESPONSE TO RESPONDENTS' CHARACTERIZATION OF THE QUESTIONS PRESENTED

In their brief in opposition to Mr. Clemmons's petition for writ of certiorari, the petitioners have improperly attempted to rewrite the questions presented to this Court by Mr. Clemmons. This Court has established that it is the petitioner who controls the scope of the questions presented. *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). "The petitioner can generally frame the question[s] as broadly or as narrowly as he sees fit." *Id.* And the "statement of any question is deemed to compromise every subsidiary question fairly included therein." SUP. CT. R. 14.1(a); *see also City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 n.8 (2005). Accordingly, Mr. Clemmons respectfully requests that the Court disregard the petitioners' attempt to improperly control and limit the issues presented for review.

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PETITIONER'S RESPONSE TO RESPONDENTS' STATEMENT OF THE FACTS

The respondents to Mr. Clemmons's petition begin their recitation of the "undisputed facts" of this case by accusing Mr. Clemmons of relying "on accusations that are unsupported by the record." Opposition at 1. Mr. Clemmons has detailed the factual support for his arguments in his Eighth Circuit briefing and, in accordance with this Court's Rule 14.1(g), has concisely summarized the material facts in his petition for writ of certiorari. Mr. Clemmons stands by the facts as he has pleaded them but will briefly address the specific facts that respondents have called into question.

First, in Footnote 1 of the respondents' opposition brief, the respondents take exception with Mr. Clemmons's reference to the fact that Officer Steigerwald testified during Mr. Clemmons's criminal retrial in 2000 that he was approximately 80 yards away from the attack on Henry Johnson. Opposition at 1. Officer Steigerwald has refused to answer Mr. Clemmons's complaint in this case or otherwise participate in the present litigation. Therefore, his prior testimony is likely admissible evidence in this case. The precise distance from which Officer Steigerwald claims to have witnessed the attack on Henry Johnson, however, is not a fact that is essential to the determination of the questions before this Court. More important is whether there were other witnesses, including Dwight Clark, whose vantage point may have been better than Officer Steigerwald's. The record is clear on this issue. Officer Steigerwald has admitted under oath that it is "possible that inmates had a better view of the incident than he did." *Clemmons v. Delo*, 124 F.3d 944, 951 (8th Cir. 1997).

Next, in Footnote 3 of their opposition brief, the respondents state that "[t]here is no evidence in the record of any 'eyewitnesses' other than Officer Steigerwald and inmate Clark." Opposition at 2-3. Mr. Clemmons takes exception with this statement. The record is clear that there were multiple people in the vicinity of the attack on Henry Johnson. The Eighth Circuit has concluded that there was a "group of inmates" standing in the area where the attack occurred. *Clemmons v. Delo*, 124 F.3d at 946. This conclusion is consistent with Mr. Clemmons's and Mr. Brooks's testimony in this case. Brooks App. at 73-74, 227-228. Further, the record is clear that there were "outcount lists" available to the respondents, which provided the names of the inmates who had permission to be in the area where the attack occurred. Brooks App. at 94, 228-229. Surely, some of the inmates in the vicinity of the attack were eyewitnesses.

If the respondents are asserting that these individuals were not properly interviewed such that memoranda documenting their eyewitness accounts can be used as evidence in this case, Mr. Clemmons is in full agreement. The duty to identify and interview these eyewitnesses rested squarely on the shoulders of the respondents and, as Mr. Clemmons has argued throughout this litigation, the respondents failed miserably in carrying out their duty. Mr. Gross and Mr. Brooks both testified that they did not interview the vast majority of the inmates identified on the outcount lists. Brooks App. at 94, 228-229. Similarly, Mr. Armontrout testified that he did not take action to identify or interview the potential eyewitnesses. Brooks App. at 192. Therefore, any lack of evidence of eyewitness accounts of the murder is the result of the respondents'

own failures and should not be used to help them avoid liability in this action.

Finally, in Footnote 4 of their opposition brief, the respondents claim that Mr. Clemmons "repeatedly asserts that this report [the investigation packet prepared by Mr. Brooks and sent to the prosecuting attorney by Mr. Armontrout] was the only contact Brooks, or any prison official, had with the prosecutor." Opposition at 3. In support of this claim, the respondents cite to Page 5 of Mr. Clemmons's petition. There is no such assertion on Page 5, or on any other page, of Mr. Clemmons's petition.

In the same footnote, the respondents assert that Mr. Clemmons has misstated Mr. Armontrout's testimony, although they do not specifically identify the alleged misstatement. As set forth in Mr. Clemmons's petition, Mr. Armontrout testified that he was responsible for sending the investigation packet at issue to the prosecuting attorney. Brooks App. at 188-189. Mr. Armontrout also testified that Mr. Gross's inter-office communication ("IOC") was the type of evidence that was typically included in such investigation packets. Brooks App. at 188-191. Yet he admitted that the IOC was not included in the packet documenting the investigation into Henry Johnson's murder. Brooks App. at 191.

Despite the respondents' attempts to cast doubt on a handful of the facts he has presented, Mr. Clemmons stands by the factual statement contained in his petition. It complies with Supreme Court Rule 14.1(g) and provides the Court with an accurate statement of the case.

PETITIONER'S RESPONSE TO RESPONDENTS' REASONS TO DENY THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION IS INCONSISTENT WITH UNITED STATES SUPREME COURT PRECEDENT

In *Youngblood v. West Virginia*, 126 S. Ct. 2188 (2006), this Court stated that "*Brady* suppression occurs when the government fails to turn over even evidence that 'is known only to police investigators and not to the prosecutor.'" *Id.* at 2190. The respondents, while acknowledging that *Youngblood* "may have moved beyond *Brady*," argue that prosecutors are the only government actors who can be held liable for the failure to produce exculpatory evidence. Opposition at 6-7. For this proposition, the respondents cite *Kyles v. Whitley*, 514 U.S. 419 (1995).

In *Kyles*, the Court determined that a prosecutor should not be shielded from liability under the *Brady* doctrine simply because he has not been informed that exculpatory evidence exists. *Id.* at 438. Nowhere in the *Kyles* opinion, however, did the Court determine that the officer who withheld the exculpatory evidence should not also be subject to liability. Here, Mr. Clemmons is simply asking this Court to clearly hold that when procedures for providing evidence to prosecutors are ignored by corrections officers or other state actors and, as a result, material evidence is withheld from the defense, such state actors should be subject to liability, along with prosecutors under the *Brady* doctrine. Such a holding would not conflict, in any way, with *Kyles*.

As the Court noted in *Kyles*, "no one doubts that police investigators sometimes fail to inform a prosecutor of all they know." *Kyles*, 514 U.S. at 438. A clear message from

this Court regarding liability for such failures would go a long way toward preventing police investigators and other similar state actors, such as the respondents in this case, from failing to meet their obligation to produce exculpatory evidence in the future.

It has long been recognized by this Court that police have a "constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel." *Monroe v. Blackburn*, 476 U.S. 1145, 1149 (1986) The Eighth Circuit's conclusion that *Brady* has never been extended to "law enforcement officials other than prosecutors" conflicts with this notion. It also conflicts with this Court's recent decision in *Youngblood*. Therefore, Mr. Clemmons respectfully requests that this Court grant a writ of certiorari so that the Eighth Circuit's opinion can be brought into line with Supreme Court authority.

II. THE EIGHTH CIRCUIT'S DECISION CONSTITUTES A DEPARTURE FROM THE EIGHTH CIRCUIT'S USUAL COURSE OF PROCEEDINGS

In *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001), the Eighth Circuit unequivocally held that a reckless failure by a corrections official to investigate leads offends a defendant's due process rights. *Id.* at 955. The court specifically held that officers conducting a post-arrest investigation have the luxury of unhurried judgments and repeated reflections, which make the recklessness standard appropriate in cases such as the one now before the Court. *Id.* at 957. Accordingly, under *Wilson*, there is no requirement, as respondents would have this Court believe, that a corrections official who fails to

investigate a lead or follow up on material evidence in a murder investigation do so with bad faith or any particular motive in order to be held liable for violating the defendant's rights.

As the Eighth Circuit stated in *Wilson*, "[l]aw enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly as illustrated by the *Brady* line of cases requiring the state to disclose exculpatory evidence to the defense." *Id.* at 957. Under *Wilson*, Mr. Clemmons must only show that Mr. Brooks recklessly failed to carry out this responsibility in order to state a valid *Brady* claim. Holding Mr. Clemmons to a higher standard would be a departure from Eighth Circuit precedent.

In their opposition brief, the respondents complain that Mr. Clemmons "fails to identify what facts were not taken in the light most favorable to him that are properly supported by the record." Opposition at 8-9. It is the totality of the facts pleaded by Mr. Clemmons before the district court and before the Eighth Circuit, and then summarized for this Court, which, when taken in the light most favorable to Mr. Clemmons, can lead to only one conclusion – that the respondents acted recklessly when they failed to investigate leads and suppressed exculpatory evidence in a murder investigation.

In analyzing Mr. Clemmons's claims, the district court identified a few of the facts upon which a reasonable jury could rely in finding that Mr. Brooks acted recklessly in violation of Mr. Clemmons's constitutionally protected rights. It found:

> Plaintiff has come forward with evidence that exculpatory information was forwarded to investigator Brooks, via an IOC from Captain Gross, and that such exculpatory information, once revealed to plaintiff, was sufficient to subsequently acquit plaintiff of the murder charges that defendant Brooks was charged with investigating . . . [T]he court finds that the IOC itself, which specifically states that it is directed to defendant Brooks, is sufficient evidence from which a reasonable jury could infer that defendant Brooks received such IOC. The Court further finds that, based upon such inference, a reasonable jury could further determine that defendant Brooks' failure to investigate the exculpatory information set forth in the IOC, and his failure to forward the IOC to the prosecutor's office as part of the murder investigation file, was the result of reckless or deliberate intent and not that of mere negligence. Additionally, the court notes that evidence of coercion is not required for a failure-to-investigate claim as asserted by defendant.

Brooks App. at 244, Petition Appendix App. 19-20.[1] Mr. Clemmons simply asks that a jury be given an opportunity to review the evidence in this case and make the factual

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[1] In their opposition, the respondents acknowledge that Mr. Clemmons has come forward with evidence that the investigation packet prepared by Mr. Brooks and forwarded to the prosecuting attorney did not contain a copy of the IOC. Opposition at 2-3. But they argue that there is no evidence in the record that the IOC was not given to the prosecutors in subsequent disclosures. Opposition at 10. Once Mr. Clemmons came forward with evidence that the IOC was not produced to the prosecutor, however, the burden to prove that it was produced to the prosecutor shifted to the respondents. The respondents have not come forward with evidence to meet this burden.

determination as to whether Mr. Brooks and the other respondents acted recklessly in violation of his civil rights.

III. THE EIGHTH CIRCUIT'S DECISION CREATES A CONFLICT BETWEEN CIRCUITS

Supreme Court Rule 10 states that the Court may choose to review a case on writ of certiorari if "a United States court of appeals has entered a decision in conflict with another United States court of appeals on the same important matter." In Mr. Clemmons's petition for writ of certiorari, he argues that the Eighth Circuit's decision in *this case* is contrary to the approach used by the Second Circuit in *Williams v. Smith*, 781 F.2d 319 (2d Cir. 1986). It seems that the respondents have misinterpreted this argument, as they have responded by providing a long recitation of the manner in which the Eighth Circuit has addressed the issue of personal involvement in a number of other cases. Opposition at 11-13. The approach used by the Eighth Circuit in the cases cited by the respondents, however, is not at issue here. The issue here is whether the Eighth Circuit, *in this case*, has created a conflict with the well-reasoned approach used by the Second Circuit.

As the respondents acknowledge at Page 12 of their opposition brief, the Second Circuit has specifically stated, "[s]ince personal involvement is a question of fact we are governed by the general rule that summary judgment may be granted only if no issues of material fact exist and the defendant is entitled to judgment as a matter of law." *Williams v. Smith*, 781 F.2d at 323. In their opposition, the respondents argue that Mr. Clemmons has failed to "show sufficient facts to support his claim or that those facts create a causal link to his injury." Opposition at 13.

Mr. Clemmons respectfully disagrees. Mr. Clemmons has put forth numerous facts that could lead a jury to determine that Mr. Gross and Mr. Armontrout recklessly violated Mr. Clemmons rights. These include, but are not limited to, the fact that both Mr. Gross and Mr. Armontrout were aware of Mr. Clark's eyewitness account of the attack on Henry Johnson, the fact that both Mr. Gross and Mr. Armontrout failed to disclose this information to the prosecuting attorney, the fact that Mr. Gross and Mr. Armontrout failed to conduct a meaningful investigation into Mr. Clark's account, and the fact that Mr. Clemmons, when finally able to use Mr. Gross's IOC in his defense, was acquitted of the murder charges for which he served over a decade on death row.

The Second Circuit, in *Williams*, unambiguously stated that the party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. 781 F.2d at 323. While it may be true that the respondents have offered facts to dispute Mr. Clemmons's claim that they were personally involved in causing his rights to be violated, these facts are certainly not undisputed and, accordingly, Mr. Clemmons's case should be heard by a jury.

CONCLUSION

Mr. Clemmons has presented evidence that Mr. Brooks, Mr. Gross, and Mr. Armontrout chose to ignore leads in the investigation of Henry Johnson's murder. They also knowingly concealed material evidence in a capital murder case. As a result of this reckless conduct, Mr. Clemmons spent over a decade on death row. For these

reasons, and for all of the reasons set forth in Mr. Clemmons's petition and in this response, Mr. Clemmons requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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